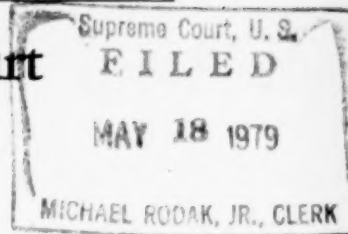


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# In the Supreme Court

OF THE  
United States

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OCTOBER TERM, 1978

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No. 78-1605

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NATHAN S. JACOBSON, *et al.*,  
*Petitioners,*

vs.

ROBERT ROSE, *et al.*,  
*Respondents.*

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## BRIEF OF RESPONDENT BELL TELEPHONE COMPANY OF NEVADA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**PRELIMINARY STATEMENT**

The petition for a writ of certiorari in this case presents routine questions regarding the calculation of damages and attorneys' fees, and whether the court of appeals erred in holding that respondent Bell Telephone Company of Nevada ("Nevada Bell") was entitled to a jury instruction on its statutory good-faith defense under the facts of this particular case.

There is no conflict in the circuits on any of these questions, nor does the petition present any important issue

that warrants the attention of this Court. In any event, the decision of the court of appeals was correct.

### STATEMENT OF THE CASE

Petitioners' statement of the case is filled with exaggerations and misstatements of the record before the court of appeals, particularly as to the conduct of respondent Nevada Bell. The facts regarding the conduct of Nevada Bell are correctly stated in the opinion of the court of appeals (Petition, Appx. A, pp. 2-5).

In September of 1971, the Washoe County Nevada Sheriff's Department and District Attorney's Office sought a court order authorizing wiretapping of certain telephone lines at the Kings Castle Hotel in order to uncover information regarding a possible kidnapping of one Landucci at the Kings Castle (*id.*, p. 2). On September 20, 1971, a state judge issued an order authorizing the interception of such wire communications, which specified that it would terminate 30 days from that date (*i.e.*, on October 20, 1971). The order "requested that Bell Telephone Company cooperate in every respect with these agencies [the Sheriff's and District Attorney's offices] in effectuating these interceptions." As the court of appeals pointed out:

"Upon receiving a copy of the order, Nevada Bell requested that a more precise order be drafted apparently to ensure compliance with applicable law. Rose and his deputy, Hicks, redrafted the order in cooperation with Nevada Bell, obtaining court approval of the revised order on September 29, 1971. The second order set the period of authorized interception as thirty days from the date of the original order of September 20.

"Benham, Chief Deputy of the Sheriff's Department and the individual responsible for effecting the wiretap, learned of the issuance of the second order. Without seeing the order but having been told of its contents he assumed that the second order provided for interception for thirty days from the signing of the second order" (Petition, Appx. A, pp. 2-3).

Petitioners misstate the record to this Court by suggesting that although Nevada Bell knew of the expiration date of the supplemental court order, it "knowingly conducted" an illegal wiretap "for several days beyond the deadline specified in the respondents' own sought-after court order" and that it "knowingly assist[ed] in the wiretapping beyond the court-ordered deadline" without a good-faith belief that its conduct was legal (Petition, p. 22). There is no support for these contentions.

As the court of appeals recognized (Petition, Appx. A, p. 3), the record established that on receipt of the court order Nevada Bell made the necessary line service available to connect the Kings Castle lines with the Sheriff's substation at which the wiretap was to be located. This service, which was rendered in good-faith compliance with the court order *and which was completed more than one week prior to the expiration date of the court's order*, constituted Nevada Bell's only active involvement in the wiretap. Its employees did not plan the wiretap; they did not procure the wiretapping equipment; they did not install the wiretapping equipment; they did not conduct the wiretap; they did not monitor the wiretapping equipment; and they did not overhear the conversation of any plaintiff. The only contact Nevada Bell had with the wiretap after it had been installed by the Sheriff's office was in connec-

tion with service work done on the lines serving Kings Castle Hotel. In response to complaints about service on those lines, two Nevada Bell employees performed service observations and work on those lines and on one occasion visited the Sheriff's substation to determine if the trouble was caused by the wiretap installed by the Sheriff.

Based on this record, the court of appeals correctly concluded that the trial judge erred in refusing to instruct the jury on Nevada Bell's good-faith defense:

"There was sufficient testimony at trial which if believed by the jury would establish that Nevada Bell held an honest and reasonable belief that it acted legally pursuant to a court order. The first court order specifically requested that Nevada Bell assist the Washoe officials. There was testimony that upon receiving notice of the first order, Nevada Bell asked the Washoe officials to draft a supplemental order to ensure compliance with applicable law. The jury could have found that Nevada Bell completed its work on the wiretaps prior to the termination date of the two orders. And the jury could also have found that Nevada Bell acted reasonably and in good faith in assuming that the police would comply with the court order, thereby obviating the need for Nevada Bell to 'police' the police" (Petition, Appx. A, pp. 15-16).

#### **REASONS WHY THE PETITION SHOULD BE DENIED**

**A. The court of appeals correctly held that statutory liability for actual damages or liquidated damages in lieu thereof was joint and several, not separate.**

Title 18, § 2520(a) of the United States Code provides that a person whose wire communications are intercepted

in violation of the statute shall have a cause of action for damages against any person who intercepts, discloses, or uses such communications and shall be "entitled to recover from any such person" his

"(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher" (18 U.S.C. § 2520(a)).

Subdivision (b) of the statute separately provides for recovery of punitive damages.

Petitioners' primary argument on the calculation of damages is that subdivision (a) of the statute, providing for recovery of actual damages or statutory "liquidated" damages in lieu thereof from "any such person" actually means that such damages are recoverable from "each respondent" (Petition, p. 13).

As the court of appeals correctly concluded, however, it is obvious that the Congress in subdivision (a) of the statute was concerned with compensating a plaintiff for injuries actually suffered, not in providing a penalty or a windfall (Petition, Appx. A, p. 8):

"If 'any such person' means that liability is individual, then a plaintiff could recover actual or liquidated damages in a § 2520 action in excess of actual loss. Indeed, the amount of recovery would depend on the number of defendants named. This result does not comport with the common understanding that these types of damages are intended to reimburse a plaintiff for his



losses and not to provide a windfall against multiple defendants" (Petition, Appx. A, pp. 7-8).<sup>1</sup>

Petitioners' unsupported argument that "the greater number of people illegally intercepting and overhearing private communications, the greater the injury to the plaintiff" (Petition, p. 14) ignores the fact that actual damages were not an issue in this case. Had petitioners properly raised the issue of actual damages, they would have been entitled to attempt to prove that they suffered a greater damage because the violation of the statute was the product of joint, rather than individual, action. However, as the court of appeals pointed out, the issue of actual damages was not properly raised and was not included in the pretrial order (Petition, Appx. A, pp. 5-6).

Petitioners also erroneously assert that the court of appeals' decision in the present case is in conflict with its prior decision under the Truth in Lending Act in *Ljepava v. M.L.S.C. Properties, Inc.* (9 Cir. 1975) 511 F.2d 935, 945. The *Ljepava* case involved the Truth in Lending Act's distinct provision for civil *penalties*, as distinguished from liquidated damages, in a case involving, not a single joint violation as in the instant case, but ten separate extensions of credit, each separately in violation of the Act. As the court of appeals recognized (Petition, Appx. A, p. 8, notes 7, 8) it would be one thing to permit multiple imposition of civil *penalties* against each defendant in order to serve the deterrent purpose of a statute; it would

<sup>1</sup>Thus, to use petitioners' own example (Petition, p. 14) if petitioners' argument were accepted, they would be entitled to recover one thousand times their actual damages in a case involving one thousand defendants.

be quite another to allow a plaintiff to recover a windfall through the multiple recovery of actual damages or statutory liquidated damages in lieu thereof from each defendant.

Petitioners' argument that multiple recovery of damages from each defendant would serve the deterrent effects of § 2520 (Petition, pp. 14-15) also ignores the difference between the compensatory actual or liquidated damages under subdivision (a) of the statute, and the punitive damages separately provided for by subdivision (b) of the statute. The obvious purpose of the damages provided in subdivision (a) of § 2520 is to compensate the plaintiff. Punitive damages are provided in order to punish and deter rather than to reimburse the plaintiff for his losses. The "unique function of punitive damages suggests that in a proper case we might determine that § 2520 does require award of punitive damages against defendants individually and not jointly" (Petition, Appx. A, p. 8, n. 7).<sup>2</sup>

As to attorneys' fees (Petition, pp. 16-18), petitioners' argument rests on the misapprehension that the district court felt bound by the amount of the judgment in awarding those fees. To the contrary, the district judge determined the amount of fees in the exercise of his discretion after taking *all* factors into account, and did *not* hold that

<sup>2</sup>The court of appeals also recognized that petitioners' arguments on punitive damages rest on a misunderstanding of the record: "[T]he district court limited the instruction as to punitive damages in accord with the evidence proffered. We refuse to accept appellants' claim that the events surrounding the wiretapping, of themselves, manifest the necessary wantonness, recklessness, or maliciousness" (Petition, Appx. A, p. 7).

he was bound by the size of the judgment (Petition, Appx. A, pp. 10-11, n. 11).<sup>3</sup>

**B. Petitioners' argument on the good-faith defense misstates the record and raises no important legal issue for this Court.**

Petitioners' argument on the good-faith defense raises no question as to the correctness of the legal standard applied by the court of appeals (Petition, Appx. A, pp. 13-16). Section 2520 expressly provides that "[a] good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter" (Petition, Appx. A, p. 13). That provision was included in the statute, because, as noted in the congressional debates, "[i]t would be ridiculous for us to authorize electronic surveillance or wiretapping and then leave exposed to criminal or civil liability those who cooperate in good faith with the officers in carrying out an order of the court to make such surveillance" (Petition, Appx. A, pp. 13-14, n. 13).

The court of appeals specifically held that in order to avail itself of the good-faith defense under 18 U.S.C. § 2520, a defendant must demonstrate both that it had a subjective good-faith belief that its actions were lawful and that this belief was objectively reasonable (see *Pier-son v. Ray* (1967) 386 U.S. 547, 555-557).

<sup>3</sup>The holding by the court of appeals that it would not review the costs awarded by the district court clerk unless they were initially reviewed by the district judge (Petition, p. 18) is in accord with long-established practice (Petition, Appx. A, p. 18) and presents no issue justifying review by this Court.

Petitioners' erroneous argument that Nevada Bell was not even entitled to a jury instruction on the good-faith defense under the particular facts of this case is based on their misstatement that the record established that Nevada Bell "knowingly conducted" the wiretap "for several days beyond the deadline specified in the respondents' own sought-after court order" (Petition, p. 22). To the contrary, the record established that all of Nevada Bell's active conduct in support of the wiretap was rendered more than one week prior to the expiration date of the court order, that Nevada Bell's assistance to the wiretap was limited to providing line service as required by the court order, and that Nevada Bell did not install or monitor the wiretapping equipment or otherwise conduct the wiretap either before or after the expiration date of the court order. The jury could have found that the only basis for Nevada Bell's liability was its assumption that the Sheriff's office and the District Attorney would disconnect the wiretap on the expiration date of the court order as required and its failure to step in to insure that they did. The court of appeals correctly concluded that "the jury could also have found that Nevada Bell acted reasonably and in good faith in assuming that the police would comply with the court order, thereby obviating the need for Nevada Bell to 'police' the police" (Petition, Appx. A, pp. 15-16).

Under these circumstances, the court of appeals was clearly correct in determining that *at the very least* Nevada Bell was entitled to a jury instruction that would have permitted the jury to determine whether its conduct, which the record established without any contradiction was taken

in good-faith reliance on the court order, was also reasonable under all of the circumstances.

Petitioners erroneously assert that Nevada Bell directed its own employees to "work on the wiretapped lines after the court-ordered termination date" (Petition, p. 23) and that even though it had knowledge of the termination date of the order it "directed its employees, after the termination date, to repair problems on the wiretapped lines so that the illegal surveillance could continue" (Petition, p. 24; emphasis supplied). What the record actually establishes is that shortly after the wiretap had been installed, there were complaints from telephone users of the Kings Castle lines of *interference on those lines*, and as a result two subordinate telephone company employees, Guthrie and Koppel, performed some routine service work, *not* in order to repair or render assistance to the wiretap, but *to remedy those complaints of trouble on the Kings Castle lines* (Rep. Tr., pp. 546-547). On *one* occasion Guthrie and Koppel went to the Sheriff's substation where the wiretap had been installed to see if the private lines at the substation *were causing the service problem on the Kings Castle lines* (Rep. Tr., pp. 546-548).

This routine service work, which was not in aid of the wiretap, but was to remedy trouble on the Kings Castle telephone lines, is expressly immunized by the statute. Title 18, § 2511(2)(a)(i) of the United States Code specifically provides that:

"It shall not be unlawful under this chapter for \* \* \* an officer, employee, or agent of any communication common carrier, whose facilities are used in the trans-

mission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service."

Moreover, petitioners disregard the fact that the record establishes that neither Guthrie nor Koppel overheard the conversation of any plaintiff in the course of these limited technical service activities. The question whether the limited technical service activities of Guthrie and Koppel, which indisputably were in good faith, were also reasonable under all of the circumstances, was one for the jury taking into account all of the facts of this case.

### CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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